IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.2078 OF 2001

Hindustan Lever Limited ..Petitioner.

Vs.

Municipal Corporation of

Gr. Bombay & anr. ..Respondents.

....

Mr.Aditya Chitale with Kusum Joshi i/b M/s.M & M Legal Venture for the Petitioner.

Mrs.A.R.Joshi for the BMC.

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**CORAM : DR.D.Y.CHANDRACHUD, J.**

25th February, 2005.

**ORAL JUDGMENT** :

1. Hindustan Lever Limited manufactures soaps and detergents in its factory at Sewri at Mumbai. The company uses a raw material by the name of Sulphonic Acid which is an Organic Surface Active Agent (OSAA). Sulphonic Acid is made by the process of sulphonation of 'Linear Alkyl Benzene'

with Sulphur Trioxide. The resultant chemical is an acid which is a chemical intermediate that is used in the manufacture of detergent powders and bars. The article is toxic and by itself is not capable of being used as a detergent in washing clothes, floors and utensils. In other words, Sulphonic Acid is to be used as raw material in the eventual manufacture of soaps and detergents. The Petitioner imports raw materials and chemical intermediates including Sulphonic Acid within the limits of the Municipal Corporation of Greater Mumbai against the payment of octroi duty.

2. At the material time between 1989 and 1992 to which this dispute relates Entry 18 of Schedule H to the Mumbai Municipal Corporation Act, 1888 prescribed the following classification of octroiable goods :

> "18. Potash, ritha, soda, alum, saline, substances, shikakai, washing soda, caustic soda, refined saltpetre, phnyle and other substances used in washing clothes, floor and utensils." (emphasis supplied).

Entry 18, it may be noted, was a part of Class III which was titled as 'Articles used for fuel, lighting, washing and industrial use'. The first part of Entry 18 refers to certain specified substances while the latter part refers to other substances used in washing clothes, floors and utensils. The position of the Petitioner was that Entry 18 comprehends only those articles which are directly used in washing clothes, floors and utensils and that Sulphonic Acid which is a raw material which is subjected to a further process of manufacture does not fall for classification thereunder. According to the Petitioner, Sulphonic Acid is toxic and cannot be directly used for washing clothes, floors or utensils. A representation was submitted by the Petitioner to the Assessor and Collector of the Municipal Corporation on 24th March, 1992 which was followed by another representation dated 25th June, 1992. The subsequent representation, a copy whereof is annexed to these proceedings, adverts to the earlier representation as having been filed before the assessing authority. This was followed by representations dated 23rd November, 1992 and 10th December, 1992. The Corporation, however,

continued to classify Sulphonic Acid under Entry 18 of Schedule H and in its communication dated 24th February, 1993 stated that the article would attract duty under this classification at the rate of 4% ad-valorem.

3. The question as to whether Entry 18 of Schedule H would cover raw materials or intermediates that were utilized in the manufacture of final products which then would be used for washing clothes, floors and utensils came up for decision by this Court in two petitions filed by Godrej Soaps Limited against the Bombay Municipal Corporation. The products in question in the proceeding before this Court were Alpha Olefin Sulphonate and Alpha Olefin and it is common ground that these products were, as in the present case, intermediates or raw materials that were used in the manufacture of detergents. A Single Judge of this Court in his decision dated 20th February, 1991 dismissed two petitions (Writ Petition 1887/83 and 1059/86) challenging the classification made by the Municipal Corporation under Entry 18. The matter was carried in appeal. On 4th March, 1993, a Division Bench of this Court allowed the appeals

(Appeals 301/91 and 302/91) and set aside the judgment of the Single Judge. Mr. Justice S.H.Kapadia ( as the Learned Judge then was) speaking for the Division Bench held that the latter part of Entry 18 of the Octroi schedule would cover only those items or substances which by themselves are capable of being used as articles for washing floors, utensils and clothes. Consequently, raw material (in that case AO and AOS) was held as not constituting such articles as would be subject to octroi in the classification under Entry 18 of the Schedule. The judgment of the Division Bench was carried in appeal to the Supreme Court and on 27th January, 1995 the Supreme Court dismissed the Special Leave Petition filed by the Municipal Corporation.

4. The octroi schedule, it may be noted, was amended on 2nd February, 1993 so as to incorporate a residuary entry, Entry 62 which provides for the levy of octroi on all articles other than those specified in the preceding entries of the schedule (Schedule H) and in Schedule H-1. On 13th September, 1996, the Petitioner addressed a representation to the Joint Municipal Commissioner

contending that prior to 2nd February, 1993 it was not liable to any octroi on Sulphonic Acid and that after the aforesaid date when the residuary entry came to be inserted it would be liable to the levy of octroi at the rate of 2% ad-valorem which was the rate applicable under the residuary entry. The representation drew the attention of the authority to the circumstance that the decision of this Court in a similar matter involving Godrej Soaps Ltd. had been confirmed by the Supreme Court. Consequently, a refund of octroi duty paid at the rate of 4% for the period 9th September, 1989 to 1st February, 1993 and in excess of 2% for the period 2nd February 1993 to 26th March 1994 was sought.

5. On 20th February, 1998, the Deputy Assessor and Collector wrote to the Petitioner stating that the Additional Municipal Commissioner had approved the classification of Sulphonic Acid under the residuary entry, Entry 62 and as being subject to the levy of octroi duty at the rate of 2% ad-valorem on 14th February, 1998. On 20th February, 1998 the Petitioner was also informed that its plea for the refund of octroi duty had

been considered and allowed, in part. The Petitioner was informed that octroi duty would be refundable from the date of the Petitioner's letter dated 10th December, 1992 until 1st February, 1993 at the rate of 4% and from 2nd February 1993 till 29th October, 1994 in excess of duty paid at the rate of 2%. Accordingly, the Petitioner was granted a refund of octroi duty in the amount approximately of Rs.67,11,626/- for a part of the claim for refund of octroi duty paid during 10th December, 1992 till 29th October, 1994. For the prior period between 9th September, 1989 and 9th December, 1992, a further representation was addressed on 8th May, 1999 by which a refund of octroi duty paid during the aforesaid period was sought. The representation of the Petitioner has been rejected by the Deputy Assessor and Collector by his order dated 26th September, 2000 and by the Assessor and Collector on 23rd July, 2001. The order passed by the Deputy Assessor and Collector on 26th September, 2000 informs the Petitioner that since the claim for refund was not made within 15 days of the first recovery i.e. from 9th September, 1989, the claim could not be acceded to.

6. Counsel appearing on behalf of the Petitioner submits that the decision of the Municipal Corporation not to refund octroi duty collected between 9th September, 1989 and 10th December, 1992 is unsustainable. The fact that no octroi duty could have been collected on Sulphonic Acid prior to 2nd February, 1993 was settled by the judgment of the Division Bench in Godrej Soaps Ltd. and even after 2nd February, 1993 octroi duty could have been levied only under the residuary entry at a rate not exceeding 2%. The Municipal Corporation, it was submitted accepted the plea but then declined to grant a refund for the period 9th September, 1989 to 10th December, 1992 for unsustainable reasons. The Petitioner had moved a representation before the Municipal Corporation as far back as on 24th March, 1992 and consequently, there was no reason why a refund should not be granted for a period of three years prior thereto. That is the submission. The Petitioner has restricted its claim between 9th September, 1989 and 10th December, 1992.

7. In the affidavit in reply which has been filed by the Municipal Corporation at the hearing and

final disposal of the Petition, it has been submitted that the classification of Sulphonic Acid under Entry 18 was not challenged by the Petitioner and that therefore the Petition for the refund of octroi duty is not maintainable. It has been then asserted that the dispute before the Supreme Court in Godrej Soaps related to the classification of Alpha Olefin and Alpha Olefin Sulphonate, whereas the present Petition relates to the classification of Sulphonic Acid. Next, it has been averred that octroi is an indirect tax, the burden whereof is passed on to the actual user or consumer and therefore, the Petitioner would not be entitled to a refund on the ground of unjust enrichment. Finally, it has been submitted that the article was classified under residuary Entry 62 by the Corporation since the earlier interpretation of Entry 18 by the Corporation was incorrect. However, the article was also capable of being classified under Entry 54-A as a petroleum product and that the classification of Sulphonic Acid under the residuary entry was also not in accordance with law.

8. These submissions can now be considered. The

Municipal Corporation had initially classified Sulphonic Acid that was being imported by the Petitioner under Entry 18 of the octroi schedule contained in Schedule H of the Act as it then stood. Entry 18 inter alia dealt with substances which were used in washing clothes, floors and utensils. The judgment of the Division Bench in Godrej Soaps was delivered on 4th March, 1993. While interpreting Entry 18, the Division Bench held that the second part of Entry 18 refers to substances which by themselves are capable of being used as articles for washing floors, utensils and clothes. Hence, a raw material which is not in itself capable of being used for these purposes could not be classified under Entry 18 since such raw material was only utilized in the manufacture of a final product which would then be used for the stipulated purpose of washing. In other words, since the raw material by itself was not capable of being used for washing floors, utensils and clothes, it could not be classified under Entry 18. The Special Leave Petition filed by the Municipal Corporation against the judgment of the Division Bench was dismissed on 27th January, 1995. The contention of the Municipal Corporation in its

affidavit in reply that the judgment of the Division Bench dealt with Alpha Olefin Sulphonate and Alpha Olefin and not with Sulphonic Acid (which is the substance involved in the present case) is clearly besides the point because the principle of interpretation which was laid down by the Division Bench in respect of Entry 18 in Godrej Soaps must necessarily apply to this case as well. As in the case before the Division Bench, in the present case as well, what is being imported is a raw material or chemical intermediate which by itself is not capable of being used directly in the washing of clothes, floors and utensils. Therefore, for the very reasons which weighed with the Division Bench in Godrej Soaps, Sulphonic Acid imported by the Petitioner was not exigible to octroi duty prior to 2nd February, 1993. The Municipal Corporation accepted the contention of the Petitioner and agreed to grant a refund for the period between 10th December, 1992 till 1st February, 1993 of the entire duty of octroi that had been paid. For the subsequent period after 2nd February, 1993 when the residuary entry was inserted in Schedule H octroi duty in excess of 2% which was the applicable rate has been refunded. Therefore, the Corporation has

accepted the position of the Petitioner that the article was not exigible to octroi duty under Entry 18. There is hence no merit in the submission of the Municipal Corporation. There is also absolutely no merit in the contention which is baldly urged in the affidavit in reply that the article would be classifiable as a petroleum product. Neither has this contention been raised before the filing of the affidavit nor for that matter is there any material to sustain the said contention. No such contention was similarly raised before the Division Bench in Godrej Soaps.

9. In so far as the question of refund is concerned, there is merit in the contention of the Petitioner that the Corporation would be liable to refund octroi which has been collected without the authority of law. That is the plain consequence of the provisions of Article 265 of the Constitution. Counsel appearing on behalf of the Corporation adverts to Rule 26 of the Octroi Rules of 1965 under which it has been provided that when octroi has been wrongly recovered or has been recovered in excess through inadvertance, error, misconstruction, misinterpretation or any other

reason on the part of the Municipal Octroi staff or the agents of the Corporation, such excess may be refunded to the importer provided that a claim for refund accompanied by the original invoice, octroi import bill, octroi receipt if any is lodged in the office of the Deputy Assessor and Collector within a period of three months from the date of such recovery or within such longer period as the commissioner may in any special case or class of cases allow. Rule 26 provides that the officer may after being satisfied about the correctness and genuineness of the claim grant a refund of octroi wrongly recovered or recovered in excess. Before the Petitioner can be allowed to obtain a refund from the Municipal Corporation necessary documents such as the original invoice, octroi import bill and the octroi receipt reflecting the payment of octroi must be produced to the satisfaction of the Assessor & Collector. This has not been controverted on behalf of the Petitioner. However, the claim of the Petitioner cannot be rejected on the ground that the plea for refund ought to have been made within a period of 15 days of the importation of each consignment within the limits of the Municipal Corporation, as stated in the

impugned order of the Deputy Assessor & Collector dated 26th September, 2000. In Salonah Tea Co. Ltd. v. Superintendent of Taxes, Nowgong((1988) 1 SCC 401). Mr. Justice Sabyasachi Mukharji (as the Learned Chief Justice then was) speaking for a Bench of two Learned Judges of the Supreme Court laid down the following principles which must govern issues of refund such as those in the present case :

> "We agree that normally in a case where tax or money has been realised without the authority of law, the same should be refunded and in an application under Article 226 of the Constitution the court has power to direct the refund unless there has been avoidable laches on the part of the petitioner which indicate either the abandonment of his claims or which is of such nature for which there is no probable explanation or which will cause any injury either to respondent or any third party. It is true that in some cases the period of three years is normally taken as a period beyond which the court should not grant relief but that is not an inflexible rule. It

depends upon the facts of each case."

10. In a subsequent decision in HMM Limited v. Administrator, Bangalore City Corporation ((1989) 4 SCC 640) octroi duty had been charged on the importation of Horlicks powder within the limits of the Bangalore Municipal Corporation where the actual activity which was performed within the municipal limits was breaking bulk consignments from drums into bottles for the purpose of exportation. The Supreme Court held that mere physical entry into city limits would not attract the levy of octroi unless goods were brought in for use or consumption or sale. The Single Judge of the High Court had allowed a refund of octroi for a period commencing from three years prior to the filing of the writ petition. The Division Bench of the High Court on appeal set aside that order. While setting aside the order of the Division Bench, the Supreme Court held that realization of tax or money without the authority of law is in violation of Article 265 of the Constitution and the collection of octroi on goods which were not meant for consumption or sale within the municipal limits was collection without the authority of law.

The Corporation, it was held, had no right to retain the amount and the amount was refundable within the period of limitation. The Supreme Court held that where there was no question of undue enrichment in respect of monies collected or retained, refund to a citizen who is entitled must be made. In a subsequent decision of three Learned Judges of the Supreme Court in Tata Engineering and Locomotive Company Ltd. v. The Municipal Corporation of the City of Thane (AIR 1992 SC 645), a refund of octroi was held similarly to be sustainable where the goods were not brought into the octroiable area for consumption or use in the area but for export and where the goods had in fact been exported. A plea of unjust enrichment was set up by the Municipal Corporation but that was rejected by the Supreme Court holding that there was no evidence that any of the articles sold by the company was subject to any price control by the Government or that the company had charged any octroi separately in its bills. The Court noted that the company had denied in its affidavit that it had recovered any amount by way of octroi from the dealers to whom goods have been sold. Rule 28 of the Rules of Octroi made provisions for refund

and inter alia provided that refund would be admissible if (i) applied for within one month from the date of export; (ii) goods are exported from out of octroi limits within a period of six months of their import and (iii) the amount claimed as refund is withdrawn within three months of intimation to the importer to receive the amount. The Supreme Court held that while the provision for re-exportation within six months is mandatory, because the factum of export cannot be in perpetual doubt, compliance with the procedure prescribed in the rules for filing claims of refund are not conditions precedent to the right to refund :

> "Rules 24 to 30 and the forms in the system of levy of octroi are intended to regulate the procedure for collection, identification of dutiable goods and correlation of goods exported with the goods imported for the purpose of refunds of octroi cllected. In view of constitutional bar, octroi is not leviable if the goods are not brought into the octroi area for purposes of consumption or use in the area but for export and in fact exported by the importer himself or the sale

> by him occasions the export. Compliance with the procedure prescribed in the Rules for filing claims of refunds are not conditions precedent for the right or eligibility for refund or the liability to refund but are provisions regarding proof of export of the goods imported and are not meant to be exhaustive either. They are to be interpreted and understood in that sense. The object of the Rules fixing a period of limitation for export however is different. The export cannot be put in perpetual doubt and the goods may be considered to have come to a repose if they were not exported within a particular period provided in the rules."

11. These decisions are in my view an answer both to the question of limitation as well as to the question of unjust enrichment that has been set up by the Municipal Corporation. In so far as the question of limitation is concerned, as the Supreme Court has held in Salonah Tea (supra) in a case under Article 226 of the Constitution, the Court has to scrutinize whether there have been any avoidable laches on the part of the petitioner of a

nature that would lead to an inference of the abandonment of the claim or whether there is delay for which there is an absence of a probable explanation. Similarly the Court has to consider as to whether there would be an injury to the respondent or to a third party of a nature that would render it inequitable to grant a prayer for refund. Three years, the Supreme Court held, is normally taken as a period beyond which the Court should not grant relief but that is not an inflexible rule. Similarly, in TELCO (supra) the Supreme Court held that compliance with the procedure laid down in the rules for filing claims of refund is not condition precedent for the right or eligibility for refund. In the present case, the facts would show that right from the inception, the Petitioner had contested the claim of the Corporation to recover octroi duty under Entry 18 of Schedule H. The representation of the Petitioner dated 25th June, 1992 and several representations thereafter including those dated 23rd November, 1992, 10th December, 1992, 13th December, 1996, 10th March, 1998 and 8th May, 1999 are on the record. These representations show that there was in fact no delay or laches on the part of

the Petitioner and certainly no conduct as would evince an intention of abandoning a claim for refund of octroi duty. The Corporation granted refund on 20th February, 1998 but confined it to the period after the Petitioner's letter dated 10th December, 1992 (till 29th October, 1994). There is no reason why the representations dated 25th June, 1992 and 23rd November, 1992 were ignored. The claim of the Petitioner to refund during the period 9th September, 1989 and 10th December, 1992 falls within a period of three years prior to the representation dated 10th December, 1992 (on which the Corporation acted and allowed refund for the subsequent period) and should be allowed.

12. In so far as the question of unjust enrichment is concerned, it has been stated in the affidavit filed on behalf of the Petitioner in these proceedings on 17th February, 2005 that no part of the octroi duty has been recovered or passed on. As in the case before the Supreme Court in Tata Engineering and Locomotive Company Limited (supra) there is absolutely no evidence to the effect that the company had charged any octroi separately on its bills or invoices. Counsel appearing on behalf

of the Petitioner produced cartons of the products to demonstrate that octroi duty has not been charged or recovered separately at any point of time.

13. In the circumstances, I am of the view that the plea of the Petitioner for the grant of refund of octroi duty for the period between 9th September, 1989 to 10th December, 1992 ought not to have been rejected by the Municipal Corporation. The Petitioner, however, before being granted a refund of octroi duty would be required to produce all the necessary documentary material as provided for in Rule 26 of the Octroi Rules. The Petitioner would be at liberty to do so within a period of 8 weeks from today. The Municipal Corporation shall grant such refund to which the Petitioner would be found entitled upon due scrutiny of the proof of payment of octroi duty within a period of three months thereafter. The Petition shall stand disposed of in the aforesaid terms. In the circumstances of the case, there shall be no order as to costs.